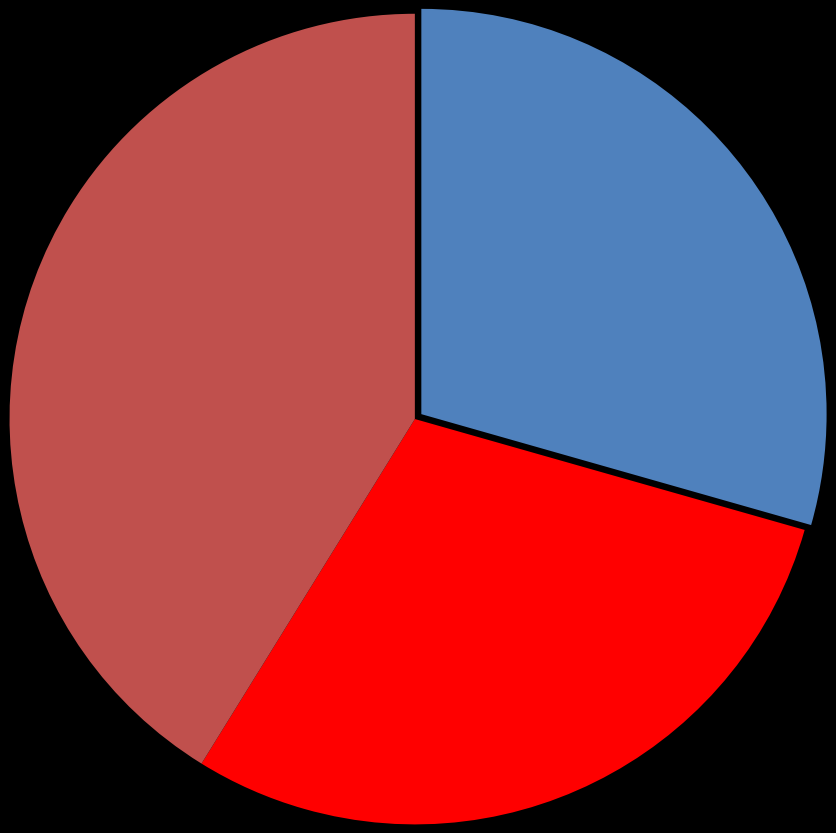
RECENT CASES:

U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

MARCY GREER & DAVID COALE
Central Texas Bench-Bar
Austin, March 1, 2024

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals for the Fifth Circuit



Trump-appointed judges are shifting the country's most politically conservative circuit court further to the right

hears cases from Texas, Mississippi and Louisiana, has
resident Donald Trump.

AL

The Washington Post
Democracy Dies in Darkness

Trump's lasting legacy on the judiciary is not just at the Supreme Court

By Ann E. Marimow

January 29, 2023 at 5:00 a.m. EST

United States Court of Appeals for the Fifth Circuit

POLITICS & POL

The Rogue Court That Paved the Way for Roe's Demise

Four judges on the Fifth Circuit are spearheading a partisan movement to redefine constitutional precedent. All of them got their start in Texas politics.

By Michael Hall | September 2022 | 6

The Trumpiest Federal Appeals Court Did Something Truly Beyond the Pale

BY MARK JOSEPH STERN

OCT 20, 2022 • 4:56 PM

“PARTY PRESENTATION”

United States v. Sineneng-Smith,
140 S. Ct. 1575 (2020)

"In our adversarial system of adjudication, we follow ***the principle of party presentation****. As this Court stated in Greenlaw v. United States, 554 U. S. 237 (2008), 'in both civil and criminal cases, in the first instance and on appeal . . . , we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.'"*

United Natural Foods, Inc. v. NLRB,
66 F.4th 536 (5th Cir. 2023)

- ***Majority:*** *"UNFI did not ask us to base our holding in § 160(b), and it would be improper for us to* ***cross the bench*** *to counsel's table and litigate the case for it."*

- ***Dissent:*** *"The majority first accuses of me of acting 'improper[ly]" by "'ross[ing] the bench to counsel's table and litigat[ing] the case.'* ***Such rhetoric is unfortunate****. It's also misplaced."* (citation omitted).

Elmen Holdings v. Martin Marietta,
86 F.4th 667 (5th Cir. 2023)

*"The magistrate judge did not 'radical[ly] transform[]' this case to such an extent as to constitute an abuse of discretion**; she merely took a different route than Martin Marietta and Elmen had suggested** to decide . . . questions presented by the parties.' Therefore, the magistrate judge did not violate the **party presentation principle** by interpreting the Gravel Lease to terminate automatically upon a missed royalty payment, even if that interpretation was contrary to the parties' reading of their contract."*

CONTRACT

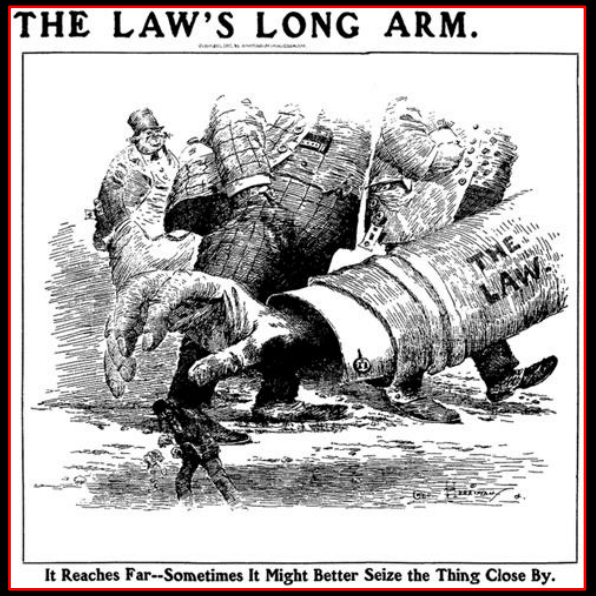
Great Lakes Ins. v. Gray Group Investments, LLC, 76 F.4th 341 (5th Cir. 2023)

"The Application Form is clearly labeled as such, so the corresponding policy reference seems clear. But the 'full'" 'application for insurance,' slightly different nomenclature, implies a broader set of documents, including the Application Form and those Gray Group submitted during underwriting. The difference in verbiage is critical because under principles of contract interpretation, '[a] word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.' Because ***'application for insurance'*** *'could suggest more than one meaning' to a 'reasonably intelligent person,' the term is ambiguous."* (citations omitted).

JURISDICTION (PERSONAL)

Shambaugh & Sons, LP v. Steadfast Ins. Co., 91 F.4th 364 (5th Cir. 2024)

"Steadfast could not have reasonably anticipated being haled into court in Texas simply because Shambaugh's records were kept in an office (in Austin) maintained by a division (Northstar) of a subsidiary (Shambaugh)."



“Parties complaining that they were harmed by a Web site's publication of user-generated content . . . may sue the third-party user who generated the content, but not the interactive computer service that enabled them to publish the content online."

***Doe v. Snap, Inc.*, 88 F.4th 1069 (5th Cir. 2023)**
(en banc vote to rehear the above)

FOR REVIEW

Smith
Elrod
Willett
Duncan
Engelhardt
Oldham
Wilson

DID NOT PARTICIPATE

Ho
Ramirez

AGAINST REVIEW

Richman
Jones
Stewart
Southwick
Haynes
Graves (panel)
Higginson (panel)
Douglas

VENUE

In re TikTok, Inc.,
85 F.4th 352 (5th Cir. 2023)

*"That evidence, however, only establishes that a high-ranking company executive and other employees worked in Austin as members of a 'Global Business Solutions Group.' It does not tie those individuals to this case, or show that they do any work related to the video-editing functionality or its implementation, or support the proposition that any of them would have physical proof relevant to the adjudication of Meishe's claims. … **[I]t is pure speculation whether any of petitioners' Austin-based employees possesses or has access to proof relevant to this case**."*

In re SpaceX,
No. 24-40103 (Feb. 26, 2024) (unpublished order)

"SpaceX petitioned this court for a writ of mandamus on February 16, 2024, requesting that we direct the district court to vacate its transfer order. Our court stayed the Southern District of Texas's transfer order on February 19, 2024. Nevertheless, the Central District of California docketed the case four days later, on February 23, 2024, as case number 2:24-cv-1352-CBM-AGR."

PRESERVATION

Dupree v. Younger, 598 U.S. 729 (2023)

*“**Trials wholly supplant pretrial factual rulings, but they leave pretrial legal rulings undisturbed.** The point of a trial, after all, is not to hash out the law. Because a district court's purely legal conclusions at summary judgment are not ‘supersede[d]’ by later developments in the litigation, these rulings follow the ‘general rule’ and merge into the final judgment, at which point they are reviewable on appeal ….”*

Marquette Transp. v. Nav. Maritime Bulgare JSC, 87 F.4th 678 (5th Cir. 2023)

*"**[1]** [Defendant's] pretrial objections preserved the arguments contained in Balkan's motion in limine concerning authentication and expert testimony. But **[2]** neither he nor Balkan argued below that the reconstruction was inadmissible summary judgment evidence. That argument thus was not preserved for appeal."*

Smith v. School Board of Concordia Parish, 88 F.4th 588 (5th Cir. 2023)

"Delta also forfeited its argument that the district court should have instead applied Rule 54(b). Delta didn't include this argument in its "Statement of the Issue" or in the body of its opening brief—rather, Delta relegated it to a footnote. ***We have repeatedly cautioned that arguments appearing only in footnotes are 'insufficiently addressed in the body of the brief'*** *and are thus forfeited. Delta's Rule 54(b) argument meets this predictable fate."*

CEATS, Inc. v. TicketNetwork, Inc.,
71 F.4th 314 (5th Cir. 2023)

"'[A]an argument is not [forfeit]ed on appeal if the argument on the issue before the district court was sufficient to permit the district court to rule on it.' Here, CEATS told the district court that a discovery violation 'must be committed willfully or in bad faith for the court to award the severest remedies available under Rule 37(b).' CEATS also argued that it did not violate the Protective Order willfully or in bad faith, because the 'communications … were clearly inadvertent.' ***That argument was enough to put the district court on notice*** *that CEATS opposed any definition of 'bad faith' that includes inadvertent conduct."*

Janvey v. GMAG LLC,
69 F.4th 259 (5th Cir. 2023)

Forfeiture?

- *"[I]ssues of law should be included in the pretrial order or else they are waived."*

- *"[T]he parties 'agree[d] that during the trial of this matter,' they would 'not present … any reference to the Magness Parties' affirmative defenses of … setoff/offset."*

Forfeiture.

- *"Because Magness failed to raise his setoff defense before the district court's entry of final judgment, he has forfeited that defense."*

JURISDICTION

(Subject Matter)

SXSW, LLC v. Fed. Ins. Co., 83 F.4th 405 (5th Cir. 2023)

- *"First, there is a potentially important difference between **LLC membership and LLC ownership**. State law governs LLC formation and organization. Several states permit LLC membership without ownership. … SXSW has not shown the relevant LLCs were formed in States that equate membership and ownership."*

- *"Second, SXSW stated that Capshaw [an LLC owner] was a Virginia resident. But **residency is not citizenship** for purposes of § 1332."*

- *"Finally, there is a timing issue. For diversity jurisdiction, we look to citizenship at the **time the complaint was filed**. … [W]e have no way of knowing whether those later documents reflect SXSW's membership structure as of October 6, 2021."*

IFG Port Holdings, LLC v. Lake Charles Harbor & Terminal Dist., 82 F.4th 402 (5th Cir. 2023)

"These factual uncertainties preclude us from deciding, on this record, whether the Port's consent was knowingly and validly given. If, for instance, the facts alleged about this friendship (as deep and longstanding) are untrue, or if the friendship is otherwise distant—though it does not seem to be—then the nondisclosure may not render the Port's consent unknowing."

SANCTIONS

Calsep A/S v. Dabral,
84 F.4th 304 (5th Cir. 2023)

*" W]hen he was offered **one last "chance"** to "come clean" and submit an unmodified source code control system, he didn't. Instead, he deleted more evidence and produced a copy of the system that had numerous other files missing. Per his own expert, those deletions were seemingly **"intentional"** and done after the filing of Calsep's suit and even **after the district court's disclosure order**. So, the district court concluded that Dabral acted willfully and in bad faith. The court didn't reach that conclusion easily. Instead, it came after **months of violations** and a long evidentiary hearing."*

Van Winkle v. Rogers,
82 F.4th 370 (5th Cir. 2023)

"Prime destroyed the most crucial piece of evidence ***just weeks after*** *learning that its tire may have caused a car accident; Prime cannot explain* ***why it transported the tire*** *to its Salt Lake facility or* ***what happened to the tire*** *following the accident; and Prime cannot demonstrate it had* ***any formal preservation or retention policy*** *for its equipment, like tires, that may have caused an injury. These circumstances create a Fact question on bad faith, necessitating a jury determination."*

TRADEMARK

Rex Real Estate I, LP v. Rex Real Estate Exch. Inc., 80 F.4th 607 (5th Cir. 2023)

"Plaintiff's anecdotal proof of confusion does not involve swayed customer purchases or initial interest confusion that can result in swayed business. It also does not involve 'potential customer[s] considering whether to transact business with one or the other of the parties.' But it has presented ***instances of potential customers of each respective company mistakenly contacting the other****. … [B]ecause Plaintiff has presented some relevant evidence of actual confusion, a reasonable jury could conclude that this digit weighs in its favor."*

Rolex Watch USA, Inc. v Beckertime, LLC, 91 F.4th 776 (5th Cir. 2024)

"[T]he district court determined that Rolex had shown that BeckerTime's use of the mark 'creates a likelihood of confusion in the minds of potential consumers" relying on the non-exhaustive list of factors set forth in [prior Circuit precedent]. It concluded that these factors 'point towards a likelihood of confusion and therefore infringement.'

BeckerTime urges us to reject the district court's analysis, noting that 'these factors are insufficient on their own to balance Rolex's trademark rights with the rights of an owner (such as BeckerTime) of a used (here, vintage) watch in ***repairing and customizing*** *that watch without having to remove the underlying Rolex marks.'"*

Rolex Watch USA, Inc. v Beckertime, LLC, 91 F.4th 776 (5th Cir. 2024)

"The district court concluded that at a minimum, Rolex's agent 'should have known about BeckerTime in 2010, ten years prior to the filing of the lawsuit, and no later than 2013 when [a Rolex employee] wrote that BeckerTime watches were junk.' It further found that 'Rolex offer[ed] ***no valid justification for this delay****.' It determined that* ***'BeckerTime likely would not have shifted its business model*** *to be reliant on the sale of altered Rolex watches if Rolex had brought this suit promptly. …'"*

DAMAGES / EXPERTS

Antero Resources Corp. v. C&R Downhole Drilling Inc., 85 F.4th 741 (5th Cir. 2023)

"[E]vidence of a competitor's rate is not necessary to prove out-of pocket damages. To show damages, Antero need only prove that the Robertson companies charged it more than the 'value [Antero] received.' … Antero paid $150,000,000 in exchange for a certain number of days of work. But because the Robertson companies did not actually work on all of the Days they billed, the value of the work Antero received was only $138,877,860. The difference in value is the amount overbilled. ***No reference to competitors' rates is needed for that statement to be true****."*

Antero Resources Corp. v. C&R Downhole Drilling Inc., 85 F.4th 741 (5th Cir. 2023)

"Taylor followed sound analytical methods to determine how long the Robertson companies should have taken to complete the drillout services. He reviewed the hundreds of completion reports and tens of thousands of invoices, accounting for uncontrollable delays and site-specific conditions. Taylor then compared the time spent to the time taken by previous drillout providers and concluded that the Robertson companies took some percentage longer than those companies. Applied to the rates charged by the Robertson companies, Taylor calculated damages in the amount of $11,122,140. ***That is a perfectly rational way of approximating overbilling****."*

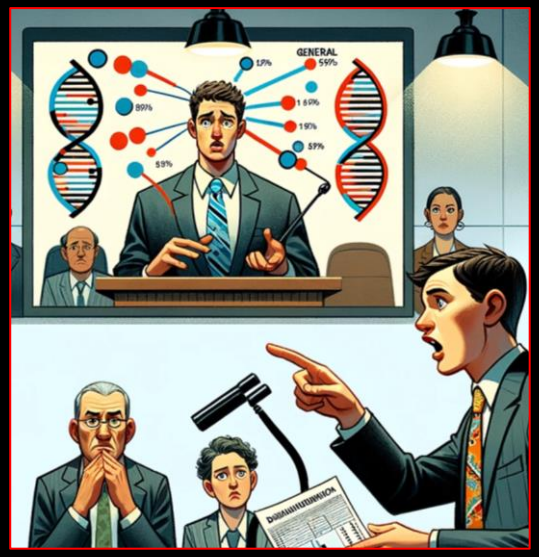
Kim v. American Honda Motor Co.,
86 F.4th 150 (5th Cir. 2023)

“Plaintiffs did not need to conduct a formal risk-utility analysis to prove there was a safer alternative design available; they needed only to offer some evidence the center airbag or reverse geometry seatbelt would not have significantly increased the risk of injury or impaired utility.”

Stewart v. Gruber, No. 23-30129
(5th Cir. Dec. 14, 2023) (unpublished)

"Plaintiffs fail to identify any precedent barring courts from considering whether the proponent of an untimely expert report declined an opportunity to cure such untimeliness by refusing to join a motion to continue that would have extended deadlines for both parties and therefore lessened any prejudice to the opposing party. Put another way, ***Plaintiffs were only willing to have extra time for them, not a similar extension for the Defendants*** *who would need to, of course, have an expert that addressed the Plaintiffs' expert. Such a notion on the part of the Plaintiffs was totally improper."*

United States v. Johnson, 85 F.4th 316 (5th Cir. 2023)



*"The prosecutor's fallacy occurs when 'a juror is told the probability a member of the general population would share the same DNA is 1 in 10,000 (random match probability), and he takes that to mean there is only a 1 in 10,000 chance that someone other than the defendant is the source of the DNA found at the crime scene (source probability).' **Conflating these two probabilities**, as the prosecutor did here, yields "an erroneous statement that, based on a random match probability of 1 in 10,000, there is a 0.01% chance the defendant is innocent or a 99.99% chance the defendant is guilty." (citations omitted).*

INJUNCTION

Whirlpool Corp. v. Shenzhen Sanlida Elec. Tech., 80 F.4th 536 (5th Cir. 2023)

Text. *"Federal Rule of Civil Procedure 65[(a)(1)] states that a court 'may issue a preliminary injunction only on notice to the adverse party.."*

Precedent*. "[A]s we stated in Corrigan Dispatch Co. v. Casa Guzman, S.A., 'Rule 65(a) does not require service of process,' but rather requires 'notice to the adverse party.'" (citation omitted).*

Practicality. *"[B]ecause 'formal service of process under the Hague Convention . . . can take months,' adopting Shenzhen's position could result in the 'unfortunate effect of immunizing most foreign defendants from needed emergency injunctive relief.'" (citation omitted).*

Direct Biologics v. McQueen,
63 F.4th 1015 (5th Cir. 2023)

*"**The district court did not abuse its discretion by declining to presume irreparable injury** based on McQueen's breach of his non-compete covenants. … [T]he Employment Agreement broadly prohibited him from providing "similar" services to Vivex that he provided to DB. The Operating Agreement covenant was even broader. Thus, McQueen could have breached these covenants even without actually using or disclosing DB's confidential information or trade secrets."*

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